

**State of New Hampshire**

**v.**

**Swann Realty Trust, Franklin T. Sykes and Catherine J. Sykes, Trustees and  
Community Bank & Trust Company**

**Docket No.: 20624-05ED**

**REPORT OF THE BOARD**

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken from the “Condemnees” pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:14. A Declaration of Taking (“Declaration”) was filed with the board on April 6, 2005 describing the property rights taken as a fee taking of one-thousandth (0.001) of a hectare (approximately 0.03 acres) and a temporary construction easement of 31 square meters from a parcel located on NH Route 28/Route 109 in Wolfeboro, New Hampshire (the Property”). See Exhibit A to the Declaration.

RSA 498-A:25 authorizes the board to hear evidence relative to an eminent domain condemnation and to determine just compensation for the taking. In this process, the Condemnor has the burden of proving by a preponderance of the evidence the amount offered will justly compensate the Condemnees. See TAX 210.12 and cases cited therein.

The board viewed the Property and held the just compensation hearing at the Carroll County Court House on November 28, 2006. The Condemnor was represented by Lynmarie C. Cusack, Esq. of the Department of Justice and Condemnee Swann Realty Trust (“Swann”) was

represented by its Trustees, Franklin T. Sykes and Catherine J. Sykes. Condemnee Community Bank & Trust Company, the holder of an undischarged mortgage on the Property, did not attend the hearing.

Laurie A. Gelinis of Bragan Reporting Associates, Inc., Post Office Box 1387, 1117 Elm Street, Manchester, New Hampshire, 03105-1387, Telephone: (603) 669-7922 took the stenographic record of the hearing. Any requests for transcripts should be ordered directly through the reporter. Parties should expect at least four (4) weeks for completion of a requested transcript.

The area taken in fee is quite small in size: approximately 133 square feet (.003 acres) and consists of a triangular area of land 4.5 feet at its widest point and located at the front of the Property facing the street. The Property before and after the taking consisted of approximately 0.18 acres.

### **Board's Rulings**

The board finds the Condemnor established by a preponderance of the evidence that the just compensation damages for the taking is \$2,700. The Condemnor based this estimate on an appraisal prepared by Stephen Bernard, a New Hampshire Certified General appraiser. The "Bernard Appraisal" found no difference in the before and after values of the Property, but did compute \$2,700 as a "Pro Rata Value Estimate" attributable to the taking, as shown on pp. 64-65 of Condemnor Exhibit No. 2. The board finds this estimate to be fair and reasonable and to represent just compensation for the taking.

Swann contended the just compensation award should be higher than this amount, but did not submit an appraisal or market related evidence to support its position. Instead, Swann relied solely on the testimony of its two Trustees, Mr. and Mrs. Sykes, and their written

presentation delivered prior to the hearing. The board considered their contentions that the taking increased the liabilities, restrictions and limitations pertaining to the Property, but did not find these contentions supported a higher just compensation award.

The Trustees acknowledged they “do not know” the actual adverse impact on the market value but conjectured it is in the “range” of “10%, 20% or 25%.” Without market evidence pertaining to the effect of the taking, however, the board could not find any basis for ascertaining such an impact, given the small area taken and the fact that some of the Condemnees uses prior to the taking occurred in the State’s former right of way. The Trustees indicated they had contacted a number of “appraisers and attorneys” in preparing for the hearing, but did not present any appraisal evidence to support their contention the value of the Property had diminished materially as a result of the taking.

Notwithstanding the Trustees’ claim that the taking decreased the “commercial viability” of the auction business they conducted on the Property, the board finds the conclusion in the Bernard Appraisal (Condemnor Exhibit No. 2 at p. 46) that the taking had no noticeable impact on the “utility, appeal or market value” of the Property to be well supported. Moreover, and in general, business goodwill, or the loss or frustration of it, is not a compensable property interest in an eminent domain action. See 2 Nichols on Eminent Domain § 5.03[6][h], citing Ranlet v. Concord R.R., 62 N.H. 561 (1883).

In summary, the board finds no basis for making a higher just compensation award than \$2,700.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Carroll County Superior Court to have the damages reassessed. This petition must be filed within twenty (20) days from the clerk's date below. See RSA 498-A:27.

In this proceeding, the board's award (\$2,700) exceeds the damage deposit (\$2,200); if neither party appeals this determination, the Condemnor shall add interest to the excess award. The interest rate is established under RSA 336:1. Interest shall be paid from the taking date to the payment date. See RSA 524:1-b; TAX 210.11.

If neither party appeals the board's award, the board shall award costs to the prevailing party. RSA 498-A:26-a; see also RSA 71-B:9; TAX 210.13 and 201.39. In this case, the Condemnees are the prevailing party because the board's award exceeds the Condemnor's deposit of damages. See Fortin v. Manchester Housing Authority, 133 N.H. 154, 156-57 (1990). Swann may file a motion for costs within forty (40) days from the date of this Report if neither party appeals the board's award. The motion must include the following:

- 1) an itemization of the requested costs, TAX 201.39;
- 2) a statement that the prevailing party sought the other party's concurrence in the requested costs, TAX 201.18(b); and
- 3) a certification that a copy of the motion was sent to the other party, TAX 201.18(a)(7).

If the other party objects to the request for costs, an objection shall be filed within ten (10) days of the motion.

A list of recoverable costs can be found in Superior Court Rule 87. Expert fees are limited to reasonable fees incurred for attending the hearing. No fees are recoverable for preparing to testify or for preparing an appraisal. See Fortin, supra, 133 N.H. at 158.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

**Certification**

I hereby certify copies of the foregoing Report of the Board have been mailed, this date, to: Lynmarie C. Cusack, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Swann Realty Trust, Franklin T. Sykes and Catherine J. Sykes, Trustees, P.O. Box 678, Wolfeboro, NH 03894, Condemnees; and Mark Northridge, Officer, Community Bank & Trust Company, 15 Varney Road, Wolfeboro, NH 03894, Mortgagee.

Date: 1/16/07

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Anne M. Stelmach, Clerk